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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Office of Secretary

In the Matter of)
)
)
Implementation of Section 304 of the)
Telecommunications Act of 1996)
)
Commercial Availability of)
Navigation Devices)
_____)

CS Docket No. 97-80

**COMMENTS OF THE
INFORMATION TECHNOLOGY INDUSTRY COUNCIL
AND THE
COMPUTING TECHNOLOGY INDUSTRY ASSOCIATION**

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May 16, 1997

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SUMMARY

The Information Technology Industry Council ("ITI") and the Computing Technology Industry Association ("CompTIA"), whose members collectively represent all sectors of the information technology industry, support the adoption of rules tailored to stimulate competition in the provision of customer premises equipment ("CPE") used to access programming services offered by multichannel video programming distributors ("MVPDs").

Robust competition is the most efficient engine for driving innovation, price competition, and consumer choice. But where barriers to entry prevent healthy competition from developing, some targeted intervention may be required to dismantle those barriers and create conditions that invite new firms to enter the market. This proceeding and its statutory predicate -- Section 629 of the Communications Act -- are meant to spawn competition in the provision of CPE in markets where MVPDs face less than full competition in their programming or CPE markets, or both.

A fundamental objective of Section 629 is to make multichannel video CPE "commercially available" through sources that are "not affiliated" with MVPDs. ITI and CompTIA believe that an MVPD and another entity with which it has an exclusive contractual relationship should be deemed to be "affiliated" for purposes of Section 629 where the arrangement has the effect of inhibiting competition in the provision of CPE or programming services. Furthermore, the Commission should interpret the statutory goal of "commercial availability" as

encompassing not only the sale and distribution, but also the manufacture, of multichannel video CPE by sources other than an MVPD or its affiliate.

The formerly distinct markets for consumer electronics, computing, telephony, and video products and services are rapidly converging. As a result, the members of ITI and CompTIA expect that the products they manufacture, distribute, and sell will become increasingly important to consumers seeking to use the expanding variety of information transmission media.

Both the Commission and the sponsors of Section 629 have recognized that similarities exist between noncompetitive MVPD programming and CPE markets, on the one hand, and the provision of telephony CPE by monopoly telecommunications carriers, on the other. We believe that these similarities warrant reference in this proceeding to tools the Commission has employed in the past to introduce and promote competition in the telephony CPE market.

For example, as a result of Commission policies, consumers now have the right to attach their own telephony CPE to the public switched network. They should have a similar right to attach their own CPE to MVPDs' systems, and to obtain CPE from sources unaffiliated with MVPDs. To the extent possible, consumers should have the ability to "plug and play" multichannel video CPE with a variety of MVPD systems, as they do with respect to telephony CPE.

To increase competition in the provision of CPE, the Commission should, as it did in *Computer II* and *Computer III*, require MVPDs to disclose the logical and physical interface specifications and protocols necessary for unaffiliated firms to manufacture CPE that can be attached to the MVPDs' systems.

Required disclosures should be broad and timely enough to avoid giving MVPDs an unfair competitive headstart over other firms seeking to bring their products to market. Parties owning rights in intellectual property that is part of the technical information an MVPD is required to disclose should be required to license that intellectual property on nondiscriminatory terms and conditions in exchange for reasonable compensation.

Section 629 permits MVPDs to provide CPE only if they do not subsidize it with revenues from their programming services and separately state the prices for CPE and programming services. In drafting these restrictions, Congress recognized that an MVPD that does not face meaningful competition in its programming services market can leverage its power in that market to inhibit competition in the adjacent CPE market.

We support the adoption of rules implementing the statutory restrictions, but believe that MVPDs subject to meaningful competition in *both* the programming services and CPE markets should not be subject to these requirements. Similarly, when an MVPD that is subject to these restrictions faces meaningful competition in both its CPE and programming service markets, these rules should be lifted as to that MVPD, provided that the public interest would be served by such action.

A variety of architectures exist among MVPD transmission systems. To the extent that some level of standardization among systems would facilitate the commercial availability of CPE used with those systems, such standardization

should be achieved through voluntary, industry-led processes, observed by the Commission. Government-mandated standards would be inappropriate.

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**JOINT COMMENTS OF THE
INFORMATION TECHNOLOGY INDUSTRY COUNCIL
AND THE
COMPUTING TECHNOLOGY INDUSTRY ASSOCIATION**

The Information Technology Industry Council ("ITI") and the Computing Technology Industry Association ("CompTIA") submit these Joint Comments in response to the Notice of Proposed Rule Making¹ in the above captioned docket.

ITI is the leading trade association of manufacturers and vendors of computers, consumer electronics, computing, and information products and services. CompTIA represents 6,300 microcomputer resellers, manufacturers, software publishers, distributors, retailers, integrators, and service companies. The members of ITI and CompTIA operate in briskly competitive markets that have fostered the introduction of countless innovative products, furthered technological progress, and benefited consumers.

¹ *Implementation of Section 304 of the Communications Act of 1996 – Commercial Availability of Navigation Devices*, CS Docket No. 97-80, FCC 97-53 (released February 20, 1997) ("NPRM").

INTRODUCTION

The Commission has initiated this proceeding in response to Section 629 of the Communications Act of 1934,² which requires the Commission to adopt rules governing the availability of "converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered by" multichannel video programming distributors ("MVPDs").

A fundamental goal of this proceeding is to encourage competition in the provision of customer premises equipment ("CPE") used with MVPDs' systems and, in turn, to maximize consumer choice with respect to such CPE.⁴ ITI and CompTIA believe that, in the long term, consumers should have the right to attach competitively-provided CPE to any multichannel video programming system. Until meaningful competition develops in the provision of MVPD services, however, MVPDs will be able to leverage their power in the programming market to dominate or control the selection of CPE used to access their programming. Therefore, we support policies that encourage the development of facilities-based competition among MVPDs so that consumers can have multiple choices in both broadband video and other services and the CPE used to access those services.

² 47 U.S.C. § 549.

³ ITI refers to such equipment herein as "customer premises equipment" or "CPE."

⁴ Joint Explanatory Statement of the Committee of Conference, Conference Report on S. 652, Telecommunications Act of 1996, H. Rept. 104-458, January 31, 1996 ("Joint Explanatory Statement"), at 186.

As convergence among video, consumer electronics, computing, and telephony continues, ITI and CompTIA anticipate that their members' products will increasingly make possible new voice, data, image, and video services, which will be transported over telephone networks, cable systems, and perhaps other transmission media. This proceeding focuses on removing barriers to entry in the cable television and other non-competitive MVPD markets that are inhibiting firms such as those represented by ITI and CompTIA from introducing new and innovative products for use with service providers. The actions we advocate in these Joint Comments are intended to create competitive opportunities in services and equipment markets in a manner that recognizes the convergence of information and telecommunications services and products.

The consumer equipment market is undergoing fundamental technological change. While the markets for telecommunications equipment and associated customer premises equipment have historically been distinct from markets for information technology equipment, such as computing devices, these markets are now converging rapidly. Information technology equipment increasingly incorporates features and functionalities traditionally associated with telephone equipment and related CPE, and vice versa.

Consistent with this convergence, the Commission should strive to achieve regulatory parity in its treatment of different service providers that face similar market circumstances. For example, many MVPDs face little or no competition in the provision of either programming services or the CPE needed

to access such services. Their market positions are similar to those enjoyed by monopoly telephone common carriers, *i.e.*, their power in the services market gives them leverage to dominate or control equipment markets. Accordingly, the regulatory models that have been developed for monopoly carriers provide useful templates for addressing competitive imbalances among MVPDs. The Commission has acknowledged that "many of [Section 629's] Congressional sponsors viewed Section 629 as the application of the Commission's telephone industry CPE model to cable and other MVPDs."⁵ ITI and CompTIA believe that the Commission should look to the telephony CPE model in implementing Section 629, but recognize that existing MVPD markets are different in some ways from the monopoly telephone services markets when the Commission crafted regulations for those markets.

We further believe that robust competition is the best disciplinarian of market forces; however, until meaningful competition develops in MVPDs' services markets, some limited regulation is needed to eliminate barriers to entry by firms seeking to provide CPE for use with MVPD systems and thereby to implement Section 629 of the Communications Act.⁶

Any rules the Commission adopts herein should be carefully circumscribed so that industry will have the flexibility to develop innovative products and services without having to clear regulatory hurdles that could delay

⁵ NPRM at ¶ 8 & n. 15 (citing National Communications Infrastructure, Hearing before the Subcommittee on Telecommunications and Finance, 103d Cong., 2d Sess. 353 (Feb. 1, 1994)).

⁶ 47 U.S.C. § 549.

bringing those products and services to market. Such a tempered approach would be in line with Congress' intent with respect to Section 629. In the Conference Committee Report on the Telecommunications Act of 1996, the Committee wrote, "The conferees intend that the Commission avoid actions which could have the effect of freezing or chilling the development of new technologies and services."⁷ Finding the proper balance between competition and regulation will be the Commission's greatest challenge in this proceeding.

I. TO FULFILL SECTION 629's "COMMERCIAL AVAILABILITY" MANDATE, CONSUMERS SHOULD HAVE THE SAME RIGHTS TO ATTACH CPE TO MULTICHANNEL VIDEO SYSTEMS AS THEY HAVE TO ATTACH TELEPHONE CPE TO THE PUBLIC SWITCHED NETWORK

Section 629(a) of the Communications Act requires the Commission to "assure the commercial availability" of CPE offered to consumers to access video and other services offered by MVPDs from "manufacturers, retailers, and other vendors" not affiliated with an MVPD.⁸ ITI and CompTIA endorse the purposes of this requirement, and believe strongly that consumers should have maximum choice in CPE used in conjunction with MVPD systems.

As noted above, we also support policies that encourage the development of facilities-based competition among MVPDs because competition in the provision of broadband services will preserve and enhance competition in the

⁷ Joint Explanatory Statement, *supra* note 4, at 186.

⁸ 47 U.S.C. § 549(a).

provision of equipment used in conjunction with those services. Proper implementation of Section 629 will be a significant step toward greater competition among broadband video delivery systems.

As a general matter, vigorous competition is the best means of assuring diversity of products and services at reasonable prices; but in the absence of meaningful competition among MVPDs, some regulatory intervention will be necessary to jump-start the transition to competition. The Commission has on several occasions been forced to intervene in non-competitive markets to remove impediments to new entry. A recent example is the *Local Competition* proceeding,⁹ in which the Commission required incumbent local exchange carriers ("ILECs") to unbundle certain network elements and make them available to competitors at rates set near their forward-looking, long-run incremental costs. Although something less than the comprehensive regulatory approach the Commission took in the *Local Competition* proceeding should be required to implement Section 629, the Commission should not hesitate to take whatever limited measures may be required to introduce competition in the multichannel video services and CPE market.

The Commission has indicated that increasing the interoperability and portability of CPE may be required to achieve true "commercial availability" of

⁹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996), *petition for review pending sub nom. Iowa Utilities Board v. FCC*, No. 96-3321 (8th Cir.).

CPE.¹⁰ To the extent possible, consumer access to CPE for multichannel video services should be modeled on the telephone and information technology industries, in which consumers "plug and play" equipment and are offered a variety of options for lease and/or purchase of equipment and services. One way to achieve a more open MVPD CPE environment is to require industry disclosure of technical information.

As it did with respect to dominant telephone carriers in *Computer II*¹¹ and *Computer III*,¹² the Commission should require MVPDs to disclose all technical data and protocols necessary to enable competing firms to provide (and consumers to attach) competitive CPE to MVPD networks. These disclosure requirements should, however, be flexible and uphold and promote the public interest in a competitive CPE environment, while maximizing protection of the disclosing parties' intellectual property rights.

¹⁰ NPRM at ¶ 24.

¹¹ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 (Final Decision), *recon.*, 84 F.C.C. 2d 50 (1980), *further recon.*, 88 F.C.C.2d 512 (1981), *aff'd sub nom. CCIA v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). See 47 C.F.R. § 64.702(d)(2) (disclosure rule).

¹² *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor – Phase II*, Report and Order, 2 FCC Rcd 3072 (1987), *recon.*, 3 FCC Rcd 1150 (1988), *further recon.*, 4 FCC Rcd 5927 (1989) (subsequent history omitted); *BOC Safeguards Order*, 6 FCC Rcd 7571 (1991), *vacated in part and remanded in part sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994), *cert denied*, 115 S.Ct. 1427 (1995).

In addition, an equipment registration process similar to that established by Part 68¹³ of the Commission's rules could facilitate consumers' attachment of competitive CPE to MVPDs' systems, and thereby further enhance the commercial availability of multichannel video CPE.

A. The Right of Consumers to Attach CPE to MVPD Systems Could Encourage Multichannel Video CPE To Become More Portable and Perhaps Interoperable and Enhance the Commercial Availability of CPE.

The telephone industry provides a good example of the benefits consumers can enjoy when CPE can be purchased through a variety of sources and be interconnected virtually anywhere. Beginning with *Carterfone*,¹⁴ and continuing through the Commission's Section 273 proceeding,¹⁵ the Commission has endeavored to expand consumers' choices for CPE that can be attached to the PSTN. The result of these efforts has been healthy competition among suppliers, aggressive pricing, and expansive consumer choice.

The same results can be obtained for multichannel video CPE, but presently, there is widespread incompatibility among CPE used to access

¹³ See *Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)*, First Report and Order, 56 F.C.C.2d 593 (1975), Second Report and Order, 58 F.C.C.2d 736 (1976), *aff'd sub nom. North Carolina v. F.C.C.*, 552 F.2d 1036 (4th Cir. 1977); *cert. denied*, 434 U.S. 874 (1977).

¹⁴ *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420 (1968), *recon. denied*, 14 F.C.C.2d 571 (1968).

¹⁵ *Implementation of Section 273 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996*, CC Docket No. 96-254, Notice of Proposed Rulemaking, FCC 96-472 (released December 11, 1996). One of the Commission's goals in Docket 96-254 is "to encourage robust competition for manufactured products through the increased availability of network planning information and fair and open forums for establishing equipment standards and for certifying equipment." *Id.* at ¶ 6.

MVPDs' transmission systems. Not only is the CPE used with different types of transmission media (e.g., cable and satellite) not interoperable across classes of MVPDs, but even among providers using similar transmission media (e.g., cable TV), the equipment that can be used in one geographic market is not portable, *i.e.*, it can not necessarily be used with a cable system in another geographic market.¹⁶

The Commission has hypothesized that

[i]f a retail market for navigation equipment is to develop, it may be necessary for there to be some degree of standardization so that the devices involved are either geographically portable and will work with similar types of MVPDs in different parts of the country or are interoperable and will function with different types of MVPDs in the same area or are both interoperable and portable.[¹⁷]

Some degree of geographic portability¹⁸ in response to consumers' demands would likely enhance the commercial availability of CPE. To create more open market conditions that would allow consumers to decide whether they want geographic portability of CPE, the Commission should require the disclosure of MVPD system interfaces and protocol specifications and curb the bundling of CPE with non-competitive MVPD programming services.

¹⁶ NPRM at ¶ 7.

¹⁷ NPRM at ¶ 24.

¹⁸ Interoperability of CPE among different classes of MVPDs should be allowed to evolve in response to market forces.

B. The Commission Should Require MVPDs To Disclose Technical Information Necessary For Competitors To Produce, And Consumers to Attach, CPE, But It Should Protect The Disclosing Parties' Intellectual Property Rights.

To encourage the emergence of competition and spawn innovation, the Commission should require MVPDs to disclose technical information regarding attachment of CPE to their systems so that competing CPE providers can keep pace with technological improvements MVPDs make to their systems.

To build competitive devices, CPE manufacturers must have timely access to the MVPD system technical specifications necessary to enable equipment attachment. Thus, the Commission should establish rules that will promote competitive CPE markets by requiring timely disclosure of technical interface and protocol information sufficient for manufacturers to produce CPE that attaches seamlessly with multichannel video service networks.

Required disclosures must be sufficiently broad in scope and defined in detail to permit CPE manufacturers to design equipment that will be completely compatible with MVPDs' transmission systems, but must recognize and respect intellectual property rights of disclosing MVPDs and their CPE suppliers.

MVPDs should be required to publicly disclose information about the physical and logical interfaces of their systems in a way that allows plug and play of CPE. Such disclosures are necessary because consumer equipment markets (and technology generally) are changing rapidly. The Commission's disclosure requirements must therefore be flexible enough to address unforeseeable and sometimes varying industry needs and product cycles while protecting the

peculiar interests of industry members and advancing competition and innovation in their markets.

ITI and CompTIA urge the Commission to consider disclosure requirements analogous to those ITI proposed in its comments in CC Docket No. 96-254.¹⁹ In short, the Commission's rules should require each MVPD in non-competitive markets to disclose all technical data and protocols regarding attachment of CPE to its system if manufacturers need that information to design and build competitive CPE for use with the MVPD's transmission system within the same time period that the MVPD or its affiliate plans to introduce its own CPE.

As the Commission proposed in the Section 273 proceeding with respect to the Bell Operating Companies ("BOCs") and their affiliates,²⁰ it should require that MVPDs' disclosures be "at the highest level of disaggregation feasible." ITI supports this standard. If competing manufacturers obtain incomplete information, they will be unable to produce competitive CPE.

Furthermore, if competing CPE manufacturers reasonably deem it necessary, they should have the opportunity to seek additional information from MVPDs whose initial disclosures seem incomplete or otherwise inadequate. Competing manufacturers should also have the ability to seek enforcement of

¹⁹ *Implementation of Section 273 of the Communications Act, supra* note 15.

²⁰ *Id.* at ¶ 24.

the disclosure rules if there is an indication that an MVPD has improperly withheld necessary information.

Finally, the Commission should require non-competitive MVPDs to disclose their implementation schedules for any material or planned changes to their system protocols that, in turn, would require CPE manufacturers to modify their own equipment specifications. Competing CPE manufacturers need such information to determine whether the technical requirements and protocols that have been disclosed are sufficient to enable them to bring the new competitive CPE to market within a time frame that gives the competitors at least a reasonable opportunity to compete with the MVPD.

The Commission has expressed concerns that its rules should not undermine intellectual property rights in proprietary technologies.²¹ The disclosure requirements we advocate should not interfere with such rights. The Commission should require non-competitive MVPDs to disclose only information regarding protocols and technical requirements related to attachment to, and/or use of, the MVPDs' transmission systems (including any security CPE the MVPDs provide themselves) that is necessary for competing manufacturers to produce competitive CPE compatible with those systems. Such disclosures need not include proprietary information regarding innovative or competitive CPE that the MVPDs may be developing.

²¹ NPRM at ¶¶ 69-70.

If required disclosure of information would involve technical information in which a party has intellectual property rights, the party owning the intellectual property rights should be required to license its intellectual property on nondiscriminatory terms and conditions, and should be entitled to reasonable compensation for licensing the protected information to any party that uses it for commercial purposes. Such an approach would be consistent with common industry practice wherein participants in standards-setting bodies agree to license their intellectual property on nondiscriminatory terms as a condition of participating in the standards-setting process and incorporating their intellectual property in an industry standard.

At the same time, the Commission's rules should protect proprietary information provided by a CPE manufacturer to an MVPD. To strike the balance between disclosure of necessary information and protection of proprietary information required to produce competitive CPE, the Commission should distinguish carefully between information concerning an MVPD's transmission system (including security CPE interfaces) and information concerning CPE itself, whether produced by an MVPD, its affiliate, or another party pursuant to an agreement with the MVPD. The former should be presumptively disclosable; the latter should be protected. Thus, information regarding CPE or CPE manufacturing provided to an MVPD by an unaffiliated party (at any stage of product development or promotion) should be presumed outside the category of information an MVPD would be required to disclose. Any party seeking such information should be required to make a compelling case that it requires the

information to produce competitive CPE that can be attached to the MVPD's system.

C. The Commission Should Rely On Market-Driven Industry Standards For Attaching Multichannel Video CPE To MVPDs' Distribution Systems.

ITI and CompTIA recognize that transmission system architectures vary widely among MVPDs. We believe that a long-term goal should be the development of flexible standards for common transmission system interfaces through voluntary industry-led standards processes.

Section 629(a) provides support for such an approach, by requiring the Commission to develop rules "in consultation with appropriate industry standard-setting organizations . . ."²² And the Commission itself has recognized that "to facilitate the Congressional goal of commercial availability for navigation devices, it might be desirable for service providers to adopt industry-wide standards in certain areas to allow the marketing of these devices as widely as possible."²³

We concur. The Commission should encourage representatives of all affected industries to coordinate voluntarily to develop appropriate technical standards that would allow multiple firms to produce interoperable CPE. The Commission should not require standards nor adopt standards itself, but should observe any industry-led standard-setting processes.

²² 47 U.S.C. § 549(a).

²³ NPRM at ¶ 64.

The Commission has properly recognized that private industry should take the lead in this area,²⁴ and we strongly support that view. For a number of reasons, government-mandated industry standards are inappropriate. First, in fast-moving industries such as the telecommunications and information services industries, a government-mandated standard stifles innovation and perpetuates obsolete technologies beyond their normal market life.²⁵ Second, a government-mandated standard is often not the product of the technological and economic considerations that would otherwise drive sound business decisions in a free market. Third, the private sector (and market forces) are better than the government at establishing standards that meet consumer needs.

D. A Part 68-Like Registration Process Would Facilitate Availability and Connectivity Of Multichannel Video CPE.

An additional means of achieving CPE connectivity and availability would be to establish a registration process similar to that in Part 68 of the Commission's Rules. When the Commission initially adopted the registration process, its goals were to enable consumers to use telephone terminal equipment obtained from sources other than the telephone company; to protect the PSTN from harms that might be caused by the interconnection of such terminal equipment; and to design a program that was simple, easy to

²⁴ NPRM at ¶ 66.

²⁵ Bruce M. Owen & Steven S. Wildman, *Video Economics*, (Harvard University Press: 1992) at 261; Stanley M. Besen & Leland L. Johnson, *Compatibility Standards, Competition and Innovation in the Broadcasting Industry*, (Santa Monica, CA: The Rand Corporation, 1986) at 131; Dr. Jeffrey Krauss, "Implications of FCC Regulation of Telecommunications Technical Standards," *IEEE Communications Magazine* (Sept. 1982) at 28, 31.

administer, and free from excessive government intervention.²⁶ History shows that the Commission has achieved its goals. ITI believes that the same objectives could be achieved with respect to multichannel video CPE by implementing a registration program similar to that described in Part 68, and it urges the Commission to consider adopting such an approach with respect to MVPD CPE.

E. "Commercial Availability" Through Unaffiliated Sources Does Not Exist Where Contractual Arrangements Foreclose Competition.

The Commission has asked how it should interpret the requirement that it assure the availability of CPE through sources "not affiliated" with MVPDs, and it has tentatively concluded that it should adopt the statutory definition of "affiliate" contained in Section 3 of the Communications Act.²⁷ We support this interpretation as a starting point only.

Section 3's definition of "affiliate" is limited to relationships between entities involving ownership or control; it does not encompass other types of relationships, such as exclusive contractual arrangements, that may rise to a level comparable to affiliations involving ownership or control. Thus, under Section 3's definition, CPE could be considered "commercially available" through a source "not affiliated" with an MVPD, for purposes of satisfying Section 629(a), as long as the CPE was available from an entity whose relationship with the

²⁶ *MTS and WATS*, *supra* note 13.

²⁷ NPRM at ¶¶ 26-27, 55 (citing 47 U.S.C. § 153(1)).

MVPD involved neither ownership nor control of one by the other, nor joint ownership or control of both by a third party.²⁸

But even where there is no ownership or control between an MVPD and a particular source of CPE, the MVPD could nevertheless effectively exclude or limit CPE competitors from the MVPD's markets through exclusive arrangements between the MVPD and manufacturers, retailers, or other sources of CPE. If such arrangements have the effect of inhibiting competition in the provision of CPE, they should be viewed as "affiliations" for the purpose of implementing Section 629(a), notwithstanding the fact that such contractual arrangements do not fall within the strict scope of the statutory definition of "affiliate."

Finally, to satisfy the commercial availability requirement of Section 629(a), CPE must not only be *sold* by at least one entity that is unaffiliated with an MVPD, but, if an MVPD manufactures its CPE (directly or through an affiliate), the CPE should also be *manufactured* by an unaffiliated entity. Section 629(a) specifically includes manufacturers among the types of unaffiliated sources that should provide CPE. If an MVPD is the sole manufacturer of CPE used with its system (either directly or through an "affiliate"), the mere fact that multiple retailers carry the product would not be sufficient to achieve the pro-competitive objectives of Section 629, since the MVPD would still control the supply of CPE.

Of course, if an MVPD's CPE technical information has been fully disclosed in a manner that would allow competing manufacturers to produce

²⁸ 47 U.S.C. § 153(1). For purposes of this definition, to "own" means to have an equity interest ("or equivalent thereof") of more than ten percent in an entity. *Id.*

CPE for the MVPD, and no other manufacturer chose to do so, there should be no requirement that another manufacturer produce the CPE.

II. TO SATISFY SECTION 629's PROHIBITION ON SUBSIDIES, MVPDs THAT DO NOT FACE COMPETITION SHOULD BE REQUIRED TO MANUFACTURE CPE ONLY THROUGH A SEPARATE AFFILIATE, AND TO UNBUNDLE CPE AND PROGRAMMING

Section 629(a) allows MVPDs to offer CPE to consumers only if they state CPE prices separately from programming service prices and if they do not subsidize CPE prices with any revenues from their programming services.²⁹ The Commission has asked for comment on the appropriate interpretation of the anti-subsidy provision, and specifically whether it prohibits the bundling of CPE and programming service.³⁰ In addition, it has asked whether the application of Section 76.923 of the Commission's Rules³¹ to rate-regulated cable systems is sufficient to satisfy Section 629's prohibition on subsidies.³²

The Commission has proposed three alternatives for implementing the subsidy prohibition: (1) continue only with existing regulations (*i.e.*, Section 76.923 of the Rules), which apply to some, but not all, MVPDs; (2) exercise more general authority to ensure that equipment and programming charges are

²⁹ 47 U.S.C. § 549(a).

³⁰ NPRM at ¶ 44.

³¹ 47 C.F.R. § 76.923. This section prohibits cable operators providing regulated basic tier service from bundling CPE with basic tier programming and requires them to price CPE based on its actual cost.

³² NPRM at ¶¶ 39, 76.